

NOTICE OF SERVICE

LA ENVIRONMENTAL ACTION
NETWORK ET AL
(Plaintiff)

NUMBER C546678 Division D

19th JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

vs.

STATE OF LOUISIANA

LA STATE ENVIRONMENTAL QUALITY
DEPT
(Defendant)

RECEIVED

SEP 07 2006

TO: MIKE MCDANIEL, SECRETARY
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
602 N. FIFTH STREET, GALVEZ BUILDING
BATON ROUGE, LA. 70802

E.B.R. SHERIFF'S OFFICE

GREETINGS:

You are hereby notified that a document was filed in our court, a certified copy is attached hereto, as requested by ADAM BABICH, Attorney.

This Notice was issued by the Clerk of Court for East Baton Rouge Parish on 06-SEP-2006.

Deputy Clerk of Court for
Doug Welborn, Clerk of Court

ATTACHED DOCUMENTATION:

PETITION FOR JUDICIAL REVIEW, AND ORDER

SERVICE INFORMATION:

Received on the _____ day of _____, 20____ and on the _____ day of _____, 20____, served on the above named party as follows:

PERSONAL SERVICE: On the party herein named at _____.

DOMICILIARY SERVICE: On the within named _____, by leaving the same at his domicile in this parish in the hands of _____, a person of suitable age and discretion residing in the said domicile at _____.

DUE AND DILIGENT: After diligent search and inquiry, was unable to find the within named _____ or his domicile, or anyone legally authorized to represent him.

RETURNED: Parish of _____, this _____ day of _____, 20____.

SERVICE: \$ _____
MILEAGE: \$ _____
TOTAL: \$ _____

Deputy Sheriff

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

546678 ^0^

IN THE MATTER OF:
LOUISIANA DEPARTMENT OF
ENVIRONMENTAL QUALITY
PERMITTING DECISION:
GENERAL PERMIT FOR WATER
DISCHARGES FROM LIGHT
COMMERCIAL FACILITIES (AI 84683)

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COST OK Amt. 268
1387
AUG 28 2006

BY [Signature]
BY CLERK OF COURT

PETITION FOR JUDICIAL REVIEW

1. This is an appeal by the Louisiana Environmental Action Network ("LEAN") and Mr. O'Neil Couvillion from a final permitting action of the Louisiana Department of Environmental Quality ("LDEQ"). Specifically, it is an appeal of LDEQ's General Permit for Discharges from Light Commercial Facilities (the "General Permit"), which authorizes discharges of pollutants into any and all waters of the state.

PARTIES

2. LEAN is a non-profit corporation organized under the laws of the State of Louisiana. LEAN serves as an umbrella organization for environmental and citizen groups.

3. LEAN's purpose is to preserve and protect the state's land, air, water, and other natural resources, and to protect its members and other residents of the state from threats of pollution. LEAN has members statewide, including members who live, work, or recreate in the area affected by the General Permit.

4. Mr. O'Neil Couvillion is an individual member of LEAN who lives and recreates in the state of Louisiana and who uses and enjoys Louisiana's water bodies. Specifically, Mr. Couvillion fishes in waters of the state and his enjoyment of this activity is impaired by the waters' pollution.

5. LEAN's members and Mr. Couvillion are directly affected and damaged by LDEQ's final decision and the General Permit. LEAN and Mr. Couvillion are aggrieved persons who may appeal LDEQ's final permit action pursuant to La. Rev. Stat. § 30:2050.21.A.

6. LDEQ is an agency of the State of Louisiana with the power to sue and be sued and took the final permit action in this matter.

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ORIGINAL FILED 8-28-06

JURISDICTION AND VENUE

7. Jurisdiction and venue are proper in this Court, and LEAN and Mr. Couvillion have the right to bring this action pursuant to La. Rev. Stat. § 30:2050.21.A.

BACKGROUND

8. On May 4 and 11, 2006, LDEQ issued a public notice on the draft General Permit for water discharges from light commercial facilities (AI 84683). The public notice invited comments to be submitted on or before June 19, 2006.

9. The General Permit allows wastewater and storm water discharges from light commercial facilities into the waters of Louisiana, without exclusion.

10. The General Permit allows pollutant discharges into waters designated by the state as Outstanding Natural Resource Waters – high-quality waters that the law requires LDEQ to afford the most stringent protections.

11. On June 19, 2006, LEAN submitted comments on the General Permit on its own behalf and on behalf of its members. The comments stated among other things, that “[c]onsistent with LDEQ’s duties as public trustee . . . ‘Outstanding Natural Resource Waters’ . . . , which require special consideration and analysis, should be excluded from the list of eligible receiving streams.”

12. LDEQ’s public comment response (the “Response”), postmarked July 27, 2006, stated that “[d]ischarges may be permitted to Outstanding Natural Resource Waters provided the discharges do not result in the degradation of the water body so that it no longer meets the Outstanding Natural Resource Waters designation.”

13. Section 1109 of the Louisiana Administrative Code states that “no degradation shall be allowed in high-quality waters that constitute outstanding natural resources.” La. Admin. Code tit. 33, pt. IX, § 1109(A)(2).

14. Section 1115 of the Louisiana Administrative Code explains that while its “antidegradation statement requires that all waters which exceed the water quality standards be maintained at their existing high quality, . . . [m]ore stringent requirements apply to those waters designated as outstanding natural resource waters.” La. Admin. Code tit. 33, pt. IX, § 1115(A)(3).

15. Section 1119(C)(4) states that LDEQ “shall not approve” a wastewater discharge or activity proposed for an outstanding natural resource water body “if it will cause degradation of these waters.” La. Admin. Code tit. 33, pt. IX, § 1119(C)(4).

16. By not excluding outstanding natural resource waters from eligible receiving waters under the General Permit, LDEQ’s Response errs as a matter of law.

17. Courts considering similar state agency attempts to interpret antidegradation policies “to permit deterioration to a point short of interference with the designated use” have found that such an “interpretation conflicts with federal law.” *Columbus & Franklin County Metropolitan Park District v. Shank*, 600 N.E.2d 1042, 1054; *see also Minnesota Center For Environmental Advocacy v. Commissioner of Minnesota Pollution Control Agency*, 696 N.W.2d 95, 107 (Minn. Ct. App. 2005) (holding that the state agency “ignored the mandate of the CWA and nondegradation rules to restrict any discharge into an [Outstanding Resource Value Water]).

18. The Ohio Supreme Court explained that the Clean Water Act recognizes a “distinction between water quality sufficient to support a designated use and the more exacting and variable antidegradation standard which is based on water quality.” *Shank*, 600 N.E.2d at 1054. Noting that the Ohio antidegradation policy, like that of Louisiana, “is required by federal law . . . to conform with federal water quality standards,” the Ohio Supreme Court dismissed the Ohio state agency’s contention that it could permit “deterioration to a point short of interference with the designated use” because that “interpretation conflicts with federal law.” *Id.*

19. Moreover, EPA guidance to the federal regulations notes that “Outstanding National Resource Waters are provided the highest level of protection under the antidegradation policy.” EPA Water Quality Standards Handbook § 4.7 (2d. ed. August 1994). Pointing to the regulation that requires water quality in Outstanding National Resource Waters to be “maintained and protected,” EPA explains that this provision means “no new or increased discharge to ONRWs” *Id.* (citing 33 C.F.R. § 131.12(a)(3)).

20. LDEQ’s response also failed to respond to several of LEAN’s other comments, examples of which appear below.

21. LDEQ failed to respond to LEAN’s comment that the General Permit is inappropriate for discharges that require extensive analysis.

22. LDEQ failed to respond to LEAN's comment requesting an explanation of how LDEQ will execute the analyses that it states it will do after issuing the General Permit.

23. LDEQ failed to respond to LEAN's comment concerning how LDEQ has analyzed or will track and measure the cumulative impacts of discharges authorized under the General Permit.

24. When rendering a decision, LDEQ as public trustee must respond to all reasonable public comments. *In the Matter of Rubicon*, 670 So. 2d 475, 483 (La. Ct. App. 1996) (court vacated the exemption granted by LDEQ holding that LDEQ's responses to public comments were not satisfactory).

25. LDEQ's duty as public trustee requires that "before granting approval of proposed action affecting the environment," LDEQ must "determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Save Ourselves, Inc. v. Louisiana Environmental Control Comm'n*, 452 So.2d 1152, 1157 (La. 1984).

26. In issuing the General Permit, LDEQ failed to perform sufficient analyses to determine whether adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.

ASSIGNMENTS OF ERROR

27. LDEQ's issuance of the General Permit allowing discharges into Outstanding Natural Resource Waters is erroneous as a matter of law.

28. LDEQ's Response asserting that the General Permit may allow pollutant discharges into designated Outstanding Natural Resource Waters "provided the discharges do not result in the degradation of the water body so that it no longer meets the Outstanding Natural Resource Waters designation" is erroneous as a matter of law.

29. LDEQ's failure to respond to LEAN's comments violates its duties as public trustee under Article IX, Section 1 of the Louisiana Constitution, *Save Ourselves*, 452 So. 2d 1152, and *Rubicon*, 670 So. 2d 475.

30. LDEQ's failure to analyze the cumulative impacts of discharges under the General Permit or to support scientific conclusions concerning how discharges under the General

Permit will affect the environment violates its duties as public trustee under Article IX, Section 1 of the Louisiana Constitution and *Save Ourselves*, 452 So. 2d 1152.

31. The General Permit is in violation of constitutional, statutory, or regulatory provisions, made in excess of statutory authority, made upon unlawful procedure, affected by error of law, arbitrary or capricious, or not supported and sustainable by a preponderance of evidence. La. Rev. Stat. § 49:964(G).

DESIGNATION OF RECORD FOR APPEAL

32. LEAN designates the following as the record on appeal in this matter: the entire public record regarding the General Permit that exists as of the date of the filing of this Petition for Judicial Review, including but not limited to the draft General Permit, the General Permit, LEAN's comments to the General Permit and LDEQ's Response.

WHEREFORE, Petitioners LEAN and Mr. Couvillion respectfully request that this Court:

- a. Vacate the General Permit, and remand the matter to LDEQ;
- b. Stay the effectiveness of the General Permit pending final resolution of this appeal.
- c. Assign all costs in this matter to LDEQ; and
- d. Award all other relief the Court finds proper.

Respectfully submitted this 25th day of August, 2006

By: 

Adam Babich, SBN: 27177

TULANE ENVIRONMENTAL LAW CLINIC

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Counsel for Louisiana Environmental Action Network and
Mr. O'Neil Couvillion

Please Serve:

Mike McDaniel, Secretary
Louisiana Department of Environmental Quality
602 N. Fifth Street, Galvez Building
Baton Rouge, Louisiana 70802

**CERTIFIED
TRUE COPY**

SEP 6 2006


DEPUTY CLERK

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

IN THE MATTER OF:
LOUISIANA DEPARTMENT OF
ENVIRONMENTAL QUALITY
GENERAL Permit for Discharges from
Light Commercial Facilities (AI 84683)

PERMITTING DECISION

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ORDER

The Court received the Petition for Judicial Review appealing the Louisiana Department of Environmental Quality's General Permit (AI 84683) that Louisiana Environmental Action Network filed with this Court on Aug 30, 2006.

The record designated by the Louisiana Environmental Action Network shall be compiled and forwarded to the Nineteenth Judicial District Court, and the appeal shall be returnable to the 19th Judicial District Court on or before the 15 day of Sept, 2006.

Additionally, the Court stays the effectiveness of the General Permit that is the subject of this appeal pending final resolution of this appeal.

Baton Rouge, Louisiana, this 30 day of Aug, 2006.

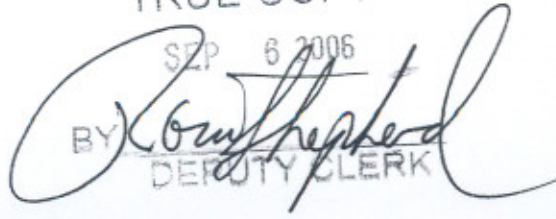

DISTRICT JUDGE
NINETEENTH JUDICIAL DISTRICT COURT

2006 AUG 28 PM 3:25
DEPT. OF ENVIRONMENTAL QUALITY
Baton Rouge, Louisiana

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SEP 6 2006

BY


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